Tabuche v Tinga & 2 others (Civil Appeal E003 of 2022)
[2024] KECA 551 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 551 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E003 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

NICHOLAS PATRICE TABUCHE ..... APPELLANT

AND

ANSAZI GAMBO TINGA ..... 1ST RESPONDENT

SAFARI GAMBO ..... 2ND RESPONDENT

REGISTRAR OF TITLES, KILIFI ..... 3RD RESPONDENT

(Being an appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) dated 3rd August 2020 in E.L.C Case No. 5 of 2012)

JUDGMENT

1. By a plaint dated 20th January 2012, the appellant, Nicholas Patrice Tabuche, sued the respondents in the High Court of Kenya at Malindi in HCCC No. 5 of 2012, which was subsequently changed to ELC Case No. 5 of 2012. In the suit, the appellant prayed as against the respondents jointly and severally for: a permanent injunction to restrain to 1st and 2nd respondents (Ansazi Gambo Tinga and Safari Gambo Tinga) from dealing in 3 parcels of land known as Kilifi/Mtwapa/3543, 3544 and 3545 (the suit properties); in the alternative, an order directing the 1st and 2nd respondents to immediately transfer to the appellant his share in the suit properties; an order directing the 3rd respondent (the Registrar of Titles, Kilifi) to cancel the registration of the appellant's share of the properties said to have been fraudulently registered in the names of the 1st and 2nd respondents; and costs of the suit.

2. The appellant's case was that he had purchased two 3-Acre portions of land curved out of plot No. 393/ Mtwapa Settlement Scheme from one Gambo Tinga Mwadzoya (Deceased); that he took possession of the two portions and developed them; and that plot No. 393/Mtwapa Settlement Scheme was

subsequently subdivided into plot No. 393A, 393B and 393C, whereupon he took possession of the two portions, namely plot Nos. 393B and 393C.

3. The appellant averred that, during the year 1987 after re- organization of Kilifi Land Registry, plot No. 393/Mtwapa Settlement Scheme was later re-registered as plot No. 694/Mtwapa Settlement Scheme in disregard of the subdivisions aforesaid; that the vendor (Gambo Tinga Mwadzoya) died in 1991 before his portions were curved out and registered in his name; that the 1st and 2nd respondents, who are the surviving widow and son of the deceased, proceeded to subdivide plot No. 694/Mtwapa Settlement Scheme into three plots comprising the suit properties aforesaid, thereby extinguishing the original plot No. 694; and that, by so doing, the 1st and 2nd respondents divested the appellant of his right to property.

4. Contemporaneous with the plaint, the appellant also filed a Notice of Motion dated 20th January 2012 supported by his affidavit sworn on 19th January 2012 seeking: injunctive orders to restrain the 1st and 2nd respondents from dealing in the suit properties pending hearing and determination of the suit; a mandatory injunction compelling the 3rd respondent to cancel registration of the suit properties "in favour of the appellant;" and that the costs of the application be provided for.

5. The appellant's Motion was anchored on 5 grounds, which are essentially a summary of the averments in the plaint, and which are more comprehensively deposed to in his supporting affidavit, but which we need not replicate here.

6. In reply to the appellant's Motion, the 1st respondent filed a replying affidavit sworn on 21st March 2012 on his own behalf and on behalf of the 2nd respondent stating, inter alia: that they were not aware of the alleged sale of any part of the suit properties to the appellant by their deceased father; that the appellant had not demonstrated that he had a prima facie case with a probability of success; that the appellant stood to suffer no irreparable harm if the temporary injunction sought was not granted; and that the balance of convenience tilted against grant of the orders sought.

7. In his ruling delivered on 3rd September 2012, C. W. Meoli, J. dismissed the appellant's Motion with costs in the cause, which prompted the appellant to move to this Court on appeal, whose particulars and outcome are not disclosed in the record as put to us.

8. Soon after the ruling aforesaid, the 1st and 2nd respondents also filed their "Written Statement of Defence" dated 1st October 2012. In their defence, the 1st and 2nd respondents denied the appellant's claim and averred that their deceased father never sold any portion of the suit properties. They also denied that the appellant ever took possession of or developed any part thereof. They contended that, in any event, the appellant's claim was statute barred under and by virtue of the *Limitation of Actions Act* (Cap. 22). They prayed that the suit be struck out with costs.

9. It is also apparent from the record as put to us that the 3rd respondent did not file a defence to the appellant's suit.

10. In addition to the foregoing, the appellant filed a Notice of Motion dated 26th September 2012 in the High Court of Kenya at Malindi in HCCC No. 5 of 2012 seeking temporary injunctive relief against the 1st and 2nd respondents restraining them from dealing in the suit properties pending hearing and determination of an intended appeal to this Court. The appellant's Motion was supported by his affidavit sworn on 26th September 2012 essentially deposing to the 7 grounds on which his Motion was anchored, the relevant ones of which were: that he was dissatisfied by the ruling dated 3rd September 2012; that he had filed an notice of appeal in that regard; and that, unless the orders of temporary

injunction sought was granted, the 1st and 2nd respondents would dispose of the suit property to his loss and detriment.

11. In reply to the appellant's Motion, the 1st and 2nd respondents filed a replying affidavit as mentioned in the impugned ruling, but which is not contained in the record as put to us. Suffice it to observe that the replying affidavit was accompanied by "Grounds of Opposition" dated 17th October 2012 containing 9 grounds, which are not related to the appeal before us, and to which we need not address ourselves.

12. Likewise, the appellant's Motion aforesaid was dismissed vide a ruling of C. W. Meoli, J. dated 19th April 2013.

13. The period of 6 years between the year 2014 and 2019 was marked by numerous notices to show cause why the appellant's suit should not be dismissed for want of prosecution. The notices were dated 16th October 2014, 21st March 2017, 30th July 2018 and 14th February 2019. We find nothing on record to suggest that the appellant took any steps to show cause or to take any steps to prosecute his suit for a period of 7 years. In response to the last of the four notices, the appellant appeared in court before J. O. Olola, J. on 25th March 2019 in the absence of learned counsel for the respondent, but failed to show cause why the appellant's suit should not be dismissed. Consequently, the learned Judge dismissed his suit under Order 17 rule 2(1).

14. Relentless, the appellant applied to have the learned Judge's order dismissing his suit set aside vide his Notice of Motion dated 15th April 2019 supported by his affidavit sworn on even date, and deposing to the grounds on which the Motion was anchored, namely: that the order of dismissal was made despite an order of stay being in place having been issued by Angote, J. on 16th February 2015 staying proceedings pending hearing and determination of High Court Succession Cause No.140 of 2010 – Asanzi Gambo Tinga & Another vs. Nicholas Patrice Tabuche; that learned counsel Mr. Nyongesa, holding brief for learned counsel for the appellant, explained to the court the status, but the court did not consider his explanation; and that it was fair, just and equitable that the orders sought be granted.

15. In reply, the 1st respondent filed an affidavit sworn on 12th July 2019 on his own behalf and on behalf of the 2nd respondent stating that Mombasa Succession Cause No. 140 of 2010 was determined on 21st July 2017; that, despite the ruling in the succession cause having been delivered two years before, the appellant took no steps to prosecute his case; that the respondents' appeal against the ruling in the succession cause aforesaid was determined on 4th April 2019 affirming the said ruling; and that the appellant was barred by statute from making the present claim in the suit properties. They urged the court to dismiss the Motion.

16. Of interest is the fact that, in the aforementioned succession cause, the appellant had sought revocation of the 1st and 2nd respondents' grant of letters of administration on the grounds that the suit properties had been listed as part of the deceased's estate, but his Motion for revocation was dismissed.

17. In response to the 1st respondent's replying affidavit, the appellant filed an undated supplementary affidavit stating that the succession cause aforesaid was still pending before Thande, J., and that the same was due for mention on 30th April 2019; that, when the cause came for mention on the due date, it was stood over generally pending ruling on his application for review of the judgment of the Court of Appeal delivered on 4th April 2019; that the defence of limitation of time ought to have been raised in the substantive suit and not in the application at hand; and that there is sufficient reason to reinstate the suit herein. He urged the court to allow his Motion.

18. In his ruling dated 24th July 2020, J. O. Olola, J. dismissed the appellant's application dated 15th April 2019 with costs. According to the learned Judge:

> " 10. ... the Plaintiff filed this application on the grounds that the Court failed to listen to its explanation and that the order was made despite another one issued earlier staying the proceedings. In my view, this Court had already pronounced itself on the matters being raised by the Plaintiff and this Court is functus officio in so far as those matters are concerned.
>
> 11. The Plaintiff herein does not ask the Court to review the said orders made on account of some error on the face of the record. Instead, he is asking this Court to make a different determination from that it made when the issues were first brought to its attention on 25th March 2019. That is a path this court is unprepared to go."

19. Dissatisfied by the Ruling of J. O. Olola, J., the appellant moved to this Court on appeal on 9 grounds set out on the face of his memorandum of appeal dated 5th August 2021, most of which are argumentative and against the grain of rule 88, which enjoins litigants to set out their grounds of appeal concisely, without argument or narrative. In summary, the appellant faults the learned Judge for: failing to note that the respondents had not established that they suffered any prejudice as a result of the delay, or that they would suffer prejudice if the trial proceeded; failing to hold that the delay was excusable on account of the inability to trace the court file between 2nd October 2012 and 12th May 2015, and was not on account of indolence on the part of the appellant; failing to appreciate that land matters are sensitive, and that judicial officers are required to hear all parties in a full trial for justice to be seen to be done; failing to appreciate that the stay order made on 12th May 2015 had not been lifted as at 11th October 2018 when the matter was first listed for dismissal for want of prosecution; failing to appreciate that failure to set down the case for hearing or to give reasons why no steps had been taken to prosecute the matter was occasioned by mistake of counsel for the appellant, which ought not to be visited on an innocent litigant; failing to give effect to the overriding objective in sections 1A and 1B of the *Civil Procedure Act* and Article 159 of the *Constitution* in denying the appellant the opportunity of a just determination; failing to appreciate that, in equity and justice, negligence on the part of an advocate should not be visited on a client; and for allowing his discretion to be vitiated by consideration of the history of the matter, which was extraneous to the application before him.

20. In support of the appeal, learned counsel for the appellant, M/s.Lumatete Muchai & Company, filed written submissions dated 4th July 2022, which they highlighted orally at the hearing, citing 7 judicial authorities, namely *Shah v Mbogo & another* [1967] EA 116; and *Mbogo & another v Shah* [1968] EA 93, highlighting the principle that a court's discretion is intended to be exercised to avoid injustice or hardship resulting from inadvertence or an excusable mistake or error; *Patel v EA Cargo Handling Services Limited* [1974] EA 75; and *Pithon Waweru Maina vs. Thuka Mugiria* [1983]. eKLR,submitting that the main concern of the court is to do justice to the parties, and that the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules.

21. On the authority of *Philip & another v Augustine Kibede* 182-88 KLR 103; and *James Mwangi Gathara & another v OCS Loitokitok & 2 others* [2018] eKLR, counsel submitted further that the appellant could not be punished or made to suffer the penalty of not having their case heard on merit because of a mistake not actuated by fraud or intention to overreact. Finally, counsel cited the case of *Ivita v Kyumbu* [1984] KLR 441, contending that the principles for dismissal of a suit for want

of prosecution had not been met in the appellant's case. They urged us to interfere with the learned Judge's discretion and allow the appeal.

22. On their part, learned counsel for the 1st and 2nd respondents, M/s. Angeline Omollo & Associates, opposed the appeal vide their written submissions dated 26th January 2024 in respect of which counsel made oral highlights at the hearing citing 4 judicial authorities. On the authority of *Richard Ncharpi Leiyagu v IEBC & 2 others* [2013] eKLR, which highlighted the principle that the court should caution itself not to exercise its discretion in a manner that will result in an injustice, counsel submitted that the respondents have been victims of constant litigation since 2012.

23. Citing the case of *Ivita vs. Kyumbu* (supra), counsel highlighted the factors taken into account or for consideration for the purpose of reinstatement of suits as thereby set out (see also *James Mwangi Gathara & another v OCS Loitokitok & 2 others* (supra). Citing the case of *Mobil Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR, counsel submitted that there had been considerable delay in the prosecution of the appellant's case, and that his negligence and laxity should not be placed on the respondent's shoulders. They urged us to dismiss the appeal with costs.

24. Having carefully considered the record of appeal, the impugned ruling and orders, the written and oral submissions of learned counsel, the cited authorities and the law, we settle the following as the main issues that commend themselves to us for determination, namely: (i) whether the learned Judge was at fault in exercising his discretion to dismiss the appellant's suit for want of prosecution; (ii) whether the learned Judge was at fault in declining to reinstate the appellant's suit; and, (iii) what orders ought we to make in determination of the appeal, including orders on costs?

25. The answer to the question as to whether or not the learned Judge acted fairly in dismissing the appellant's suit for want of prosecution, and in subsequently declining the application for reinstatement, is best informed by the events and circumstances leading to the dismissal of the suit, which may be summed up thus:

    a. Soon after filing suit on 20th January 2012, the appellant filed a Motion seeking temporary injunctive relief pending hearing and determination of his suit, which application was dismissed on 3rd September 2012.

    b. Dissatisfied with the ruling, he moved to this Court on appeal, whose outcome remains undisclosed.

    c. The appellant filed yet another Motion dated 26th September 2012 seeking injunctive orders to restrain the 1st and 2nd respondents from dealing in the suit properties pending the aforesaid appeal to this Court.

    d. The appellant's Motion dated 26th September 2012 was likewise dismissed on 19th April 2013.

    e. We take it that pleadings closed 14 days after service on the appellant of the 1st and 2nd respondent's joint defence filed on 1st October 2012 as contemplated in Order 2 rule 13 of the Civil Procedure Rules, 2010. In view of the fact that the record does not disclose the date by which the appellant was served, and the 3rd respondent having failed to file a defence within the time prescribed under the Rules, it would be reasonable to presume that pleadings closed sometime towards the end of 2012, making it possible for the appellant to set the suit down for hearing any time after 19th April 2013 subject, of course, to the trial court's calendar.

    f. It is noteworthy that the appellant's suit remained in limbo for 2 years or thereabouts until 12th May 2015 when it came for mention, but stayed pending determination of Mombasa Succession Cause No. 140 of 2010 in which the appellant had sought revocation of the Grant

of Letters of Administration intestate to the estate of Ggambo Tinga Mwadzoya (Deceased) previously issued to the 1st and 2nd respondents.

26. The rationale of the appellant's move for revocation of the Grant aforesaid and the effect thereof on the suit in issue is not for us to judge. Neither is it in issue before us and, accordingly, we withhold our comment thereon.

27. Suffice it to note that the final outcome of the appellant's Motion in the succession cause is undisclosed in the record as put to us, but for a series of interventions, including:

    a. the ruling and order dated 21st July 2017 staying the suit in ELC Case No. 5 of 2012 pending determination of the succession cause;

    b. an order staying the implementation of the Grant aforesaid to allow the Kilifi District Lands Registrar to attend court at the hearing of the succession cause on 4th October 2017 to confirm the nexus (if any) between the three suit properties;

    c. an appeal by the 1st and 2nd respondents against the ruling of 21st July 2017 which was allowed on 4th April 2019 allowing the appeal and dismissing the appellant's Summons for revocation of Grant; and

    d. the appellant's application for review of this Court's judgment dated 4th April 2019 which, according to the 1st and 2nd respondents, was allowed on terms not disclosed in the record before us but, presumably, reinstating the appellant's Summons for revocation of grant which, according to submissions by counsel for the 1st and 2nd respondents, are yet to be heard and determined.

28. Having carefully considered the foregoing series of activities, the reliefs sought in the appellant's suit in ELC Case No. 5 of 2012 and in his Summons for revocation/annulment of the 1st and 2nd respondents' Grant in Succession Cause No. 140 of 2010, we can only conclude that none of the steps taken in the succession cause aforesaid or in the aforementioned Motions were suitably designed to advance the course of the appellant's suit as framed. They were by no means intended to advance the prosecution of ELC Case No. 5 of 2012 to which this appeal relates.

29. For the avoidance of doubt, the appellant's prayers in the suit in the ELC were:

> "(a) A permanent injunction restraining the 1st and 2nd defendants by themselves, their servants, agents, employees or otherwise howsoever from disposing off, selling, alienating and/or disposing off the property now known as Kilifi/Mtwapa/3543, KIlifi/Mtwapa/3544 & Kilifi/Mtwapa/3545.
>
> b. In the alternative, an order directing the 1st and 2nd defendants to immediately transfer the portion of the plaintiff's property to him.
>
> c. An order directed at the 3rd defendant directing him to cancel registration of the plaintiff's property fraudulently registered in the 1st and 2nd defendants' names.
>
> d. Costs of this suit."

30. On the other hand, the prayers in his Summons for revocation of grant in the succession cause, which we take the liberty to replicate here, were:

> " 1. That this application be certified as urgent and be heard ex-parte in the first instance.
>
> 2. That this Honourable Court be pleased to revoke/annul the grant of probate to Ansazi Gambo Tinga & Safari Gambo Tingamade on the 15th June, 2010 in the matter of the estate of Gambo Tinga Mwadzoya (Deceased).
>
> 3. That this Honourable court be pleased to issue such other orders it deems just and convenient to meet the ends of justice.
>
> 4. Thatcosts of this application be provided for."

31. A cursory look at the appellant's case in the ELC and his Summons in the succession cause aforesaid leaves no doubt in our minds that the two causes of action are worlds apart and capable of being pursued and prosecuted separately. We do not agree with learned counsel for the appellant that there was need to first pursue the succession cause and the related appeals and applications before prosecuting their client's case in the ELC. Simply put, pendency of the succession cause for revocation of grant could not have been a valid excuse for want of prosecution of the appellant's suit in the ELC, more so in the face of 4 notices to show cause issued on 16th October 2014, 21st March 2017, 30th July 2018 and 14th February 2019.

32. Finally, when on 25th March 2019 the suit came up for hearing of the notice to show cause dated 14th February 2019, the learned Judge dismissed it for want of prosecution pursuant to Order 17 rule 2(1) of the *Civil Procedure Rules* stating as follows:

> " Court: No action has been taken in this matter which was filed in the year 2014.
>
> On 4/2/2019 this Court gave the parties notice to come to court and explain the position of Petition 140 of 2010.
>
> I am now being told from the bar that the matter is pending in the Court of Appeal.
>
> I am not satisfied as it were that any cause has been shown why no action has been taken to prosecute this matter for the past five years.
>
> Accordingly, this suit is hereby dismissed for want of prosecution.
>
> Each party shall bear their own costs."

33. The order made by the learned Judge dismissing the appellant's suit for want of prosecution was in exercise of his judicial discretion with whose interference is not without limit. Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA had this to say:

> "The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account;

fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

34. We find nothing on the record as laid before us to suggest that the learned Judge misdirected himself in law; that he misapprehended the facts; that he took account of considerations of which he should not have taken account, or that he failed to take account of considerations of which he should have taken account; or that his decision, albeit a discretionary one, was plainly wrong.

35. That said, it is not lost to us that a Judge is accountable for his/her decision and for the basis on which it is made. As the ELRC at Mombasa in *Kridha Limited v Peter Salai Kituri* [2020] eKLR correctly held:

> "24. ... a judge or magistrate exercising judicial discretion bears the burden of accounting for their decision and in order to discharge this burden, the judge or magistrate ought to explain the basis of their decision."

36. In our considered view, the learned Judge sufficiently explained the basis of his decision to dismiss the appellant's suit, which had not been prosecuted for a period of about 7 years. As the Judge correctly observed, pleadings close 14 days after service on the appellant of the 1st and 2nd respondent's joint defence filed on 1st October 2012. However, the precise date of service remains undisclosed. What is clear, though, is that prior to the four notices to show cause aforesaid, the appellant took no meaningful steps to prosecute his suit; that his chain of proceedings in the succession cause aforesaid, and the subsequent appeal to this Court, were of no consequence to his statutory obligation to prosecute his claim in ELC No. of 2011; and that he failed to satisfy the trial court that there was justifiable cause not to dismiss his suit after so long a period of inaction (see *Mwangi S. Kimenyi v Attorney General & another* [2004] eKLR)

37. In addition to narrating the assemblage of events to justify his inaction, the appellant sought to lay blame at his counsel's feet. With regard to the alleged mistake of counsel, we take to mind the High Court decisions in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR; and *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR where the court correctly held that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of the litigation and that, while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by the court to exercise discretion in favour of such a party cannot be impugned. See also the case of *Salkas Contractors Limited v Kenya Petroleum Refineries Limited* [2014] eKLR where this Court held that the longer the delay, the greater the prejudice suffered by the other parties.

38. In view of the foregoing, the submission by counsel for the appellant that "the respondents will suffer no hardship should the suit be expedited for hearing" does not hold. Their contention that "the matters raised in the plaint are not trivial and would call for adjudication if not for anything to right the manifest impunity visited on the appellant and granting them justice" is most certainly why the more he should have taken drastic steps to prosecute his case.

39. We also take to mind the hallowed principle that "to whom much is given, much is required." One of the latitudes given to judges and judicial officers in the course of their work is judicial discretion. *Black's Law Dictionary*, 10th Edition defines judicial discretion as:

> " The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

40. We need not over-emphasize the fact that the inordinate delay and the number of years during which the proceedings in the suit dismissed by the impugned order remained in limbo is by no means a demonstration of the best way in which justice is administered. We form this view taking to mind the correct test applied by the High Court (Chesoni, J.) in *Ivita v Kyumbu* [1975] eKLR in the following words:

> " So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution."

41. As already observed, the prolonged delay in the prosecution of the appellant's case was inexcusable. The winding path of inconsequential applications and side-show proceedings that did nothing to advance the intent and purpose of the suit in issue cannot be cited as an excuse or ground to unwind the wheels of justice that turned on the impugned ruling and order. All factors considered, we find nothing to fault the learned Judge for dismissing the appellant's suit for want of prosecution. To our mind, the learned Judge acted fairly in exercise of his judicial discretion and within the rules and principles of law.

42. Turning to the 2nd issue as to the propriety of the learned Judge's discretionary decision not to reinstate the appellant's suit, we hasten to observe that the 2nd issue turns on our finding on the 1st issue with which we have just determined.

43. The question as to whether the appellant was entitled to reinstatement of his suit as of right finds answer in *Black's Law Dictionary* (Tenth Edition), which defines judicial discretion as:

> "The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as amatter of right." [Emphasis added]

44. Reinstatement of a suit dismissed for want of prosecution is a discretionary remedy and not as of right. In any event, each case depends on its own circumstances. The circumstances surrounding the case at hand are that reinstatement was not deserved in the face of the inordinate delay and the multiplicity of applications that counted for little towards final determination of ELC Case No. 5 of 2012. The appellant has not persuaded us that that discretion was exercisable in his favour. Neither was the learned Judge at fault in declining the orders sought.

45. Having carefully considered the record as put to us, the impugned order, the rival submissions of the respective counsel, and the law, we form the view that the appellants' appeal fails and is hereby dismissed with no order on costs.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR